

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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DANIEL W. FAERFERS and KATJA
FAERFERS,

Plaintiffs,

v.

CAVIAR CREATOR, INC., a Nevada
corporation, individually and
as successor to CAVIAR
CREATOR, INC., an Oregon
corporation,

Defendants.

NO. CIV. S 04-2690 MCE PAN

MEMORANDUM AND ORDER

CAVIAR CREATOR, INC., a
Nevada corporation,

Counterclaimant/
Cross-Complainant,

v.

DANIEL W. FAERFERS, an
individual; KATJA FAERFERS,
an individual; SINCLAIR WILSON,
an unknown business entity;

Counter-defendants/
Cross-defendants.

1 Through the present action Caviar Creator, Inc. ("Caviar")
2 has moved for leave to add a third party, Sinclair Wilson
3 ("Sinclair"), to this action. Sinclair has concurrently filed a
4 motion to strike all Caviar's claims against it. For the reasons
5 set forth below, Caviar's motion for leave to add a third party
6 is granted and Sinclair's motion to strike is denied.

7
8 **BACKGROUND**
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10 This action arises out of a settlement agreement
11 ("Agreement") entered into by the Parties that was intended to
12 settle a previously filed lawsuit. All Parties vigorously
13 maintain that the opposing Parties have breached that Agreement
14 giving rise to this action.

15 The Faerfers initially filed this action against Caviar
16 alleging breach of contract, fraud and seeking declaratory
17 relief. Caviar counter-claimed against the Faerfers likewise
18 alleging breach of contract and seeking declaratory relief. In
19 that same responsive pleading, Caviar cross-claimed against
20 Sinclair but failed to seek leave to add a third party in
21 violation of this Court's pretrial scheduling order ("Order")
22 giving rise to these concurrent motions.

23
24 **STANDARD**
25

26 The Court is normally required to enter a pretrial
27 scheduling order within 120 days of the filing of the complaint.
28 Fed. R. Civ. P. 16(b). The scheduling order "controls the

subsequent course of the action" unless modified by the Court. Fed. R. Civ. P. 16(e). Orders entered before the final pretrial conference may be modified upon a showing of "good cause," Fed. R. Civ. P. 16(b), but orders "following a final pretrial conference shall be modified only to prevent manifest injustice." Fed. R. Civ. P. 16(e).

Rule 16(b)'s "good cause" standard primarily considers the diligence of the party seeking the amendment. Johnson v. Mammoth Recreations, 975 F.2d 604, 609 (9th Cir. 1992). The district court may modify the pretrial schedule "if it cannot reasonably be met despite the diligence of the party seeking the extension." Fed. R. Civ. P. 16 advisory committee's notes (1983 amendment); Id. Moreover, carelessness is not compatible with a finding of diligence and offers no reason for a grant of relief. Id. Although the existence or degree of prejudice to the party opposing the modification might supply additional reasons to deny a motion, the focus of the inquiry is upon the moving party's reasons for seeking modification. If that party was not diligent, the inquiry should end. Id.

ANALYSIS

1. Joinder

As noted above, Caviar Creator has filed a motion for leave to add Sinclair to this action. Sinclair opposes Caviar's motion on the ground that it is not a party to the Agreement and, therefore, is not a proper party to this action.

Under Federal Rule of Civil Procedure 20, joinder is proper

1 if (1) the plaintiffs asserted a right to relief arising out of
2 the same transaction and occurrence and (2) some question of law
3 or fact common to all the plaintiffs will arise in the action.
4 See Fed. R. Civ. P. 20(a); Desert Empire Bank v. Ins. Co. of N.
5 Am., 623 F.2d 1371, 1375 (9th Cir. 1980). Even once these
6 requirements are met, a district court must examine whether
7 permissive joinder would comport with the principles of
8 fundamental fairness or would result in prejudice to either side.
9 Coleman v. Quaker Oats Co., 232 F.3d 1271, 1296 (9th Cir.
10 2000) (citations and quotations omitted).

11 Caviar's asserted right to relief in this action arises out
12 of the Agreement executed primarily between the Faerfers and
13 Caviar. Sinclair's involvement arises through one of its former
14 employees, Cris Vaughan. At the time the Agreement was executed,
15 Vaughan was employed by Sinclair and was attorney of record for
16 Daniel Faerfer. Significantly, Paragraph two of the Agreement
17 names Sinclair as well as Vaughan.¹ In addition, the signatory
18 page contains the following legend:

19 APPROVED AS TO FORM AND TERMS OF PARAGRAPH 2:
20 Sinclair Wilson

21 By /s/ Cris Vaughan
22 Attorneys for Daniel Faerfers

23 Decl. of M. MacDonald, Exh. A., P. 18.

24 In light of the foregoing, it is clear that Caviar's
25 asserted right to relief arises out of a transaction common to

26 ¹The Parties dispute whether Sinclair was, in fact, bound to
27 perform any duties under the Agreement. Specifically, Sinclair
28 urges that Vaughan entered into the Agreement in his individual
capacity. Caviar contends that Vaughan was acting as Sinclair's
agent obligating it under the Agreement.

1 all Parties, namely, the performance of the Agreement.
2 Similarly, the issue of whether Sinclair was bound under the
3 Agreement and, if so, whether it properly performed its duties
4 thereunder are factual questions common to all Parties.
5 Accordingly, the Court is satisfied that Sinclair is a proper
6 party to this action.

7 A finding that Sinclair is a proper party does not end the
8 inquiry. Courts must also ascertain whether joining a party
9 comports with fundamental fairness or would result in prejudice
10 to either side. Considering the scope of Caviar's claim as a
11 whole, the Court finds that fairness will be best served by
12 permitting Caviar to bring its case concurrently against the
13 Faerfers and Sinclair rather than forcing it to seek redress from
14 each independently. In addition, the Court sees no injustice or
15 prejudice that would result from permitting Caviar to join
16 Sinclair at this early stage of the litigation. As noted above,
17 discovery is in its initial stages and Sinclair will have ample
18 opportunity to prepare its case. Accordingly, the Court finds
19 that the elements of joinder are satisfactorily met.

20 21 **2. Amendment of Pretrial Scheduling Order**

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23 Sinclair avers that Caviar's motion for leave should be
24 denied because Caviar violated this Court's Order by adding
25 Sinclair without first seeking leave as required. Caviar replies
26 that good cause exists for its failure to properly seek leave
27 before adding Sinclair. Specifically, Caviar contends that the
28 following facts establish good cause: 1) the cross complaint

1 naming Sinclair was Caviar's first responsive pleading and first
2 opportunity to name a cross defendant; 2) Caviar disclosed that
3 it intended to name a third party in the Parties' Joint Status
4 Report; and 3) discovery is in its initial stages so that adding
5 Sinclair will not prejudice any party.

6 As discussed above, the focus in determining whether to
7 permit a modification of a pretrial scheduling order is the
8 diligence of the party seeking the amendment. It is important to
9 note at the outset that this case has had an unusual procedural
10 progression. The case was filed and, prior to any responsive
11 pleadings, three motions to dismiss were filed and adjudicated.
12 It was only then that this Court issued its pretrial scheduling
13 order. Thereafter, Caviar filed its first responsive pleading
14 improperly naming Sinclair as a party. Caviar became aware of
15 its error on Friday, August 26, 2005, when Sinclair filed its
16 motion to strike. By Monday, August 29, 2005, Caviar had filed
17 the appropriate motion for leave to add a third party. The
18 foregoing facts clearly demonstrate Caviar's diligence in
19 pursuing this action. While Caviar failed to seek leave as
20 required, permitting Caviar to correct its mistake will not
21 result in any prejudice to Sinclair and will, instead, serve to
22 effect judicial economy.

23 The Court finds that Caviar was sufficiently diligent in
24 pursuing its claims and Sinclair will suffer no prejudice by
25 being added at this early stage of litigation. Accordingly,
26 Caviar's motion for leave to add a third party is granted.

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1 **3. Sinclair's Motion to Strike**

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3 Sinclair's motion to strike is based entirely on its
4 argument that it is not a proper party to this action. As set
5 forth in detail above, the Court has concluded that Sinclair is
6 properly a party and will suffer no injustice by being joined in
7 the present action. Accordingly, Sinclair's motion to strike is
8 denied.

9
10 **CONCLUSION**

11
12 Because Caviar has satisfied its burden of showing good
13 cause and judicial economy warrants, Caviar's motion for leave to
14 add a third party is hereby GRANTED and Sinclair's motion to
15 strike is hereby DENIED.

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17 IT IS SO ORDERED.

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19 DATED: October 27, 2005

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23 MORRISON C. ENGLAND, JR.
24 UNITED STATES DISTRICT JUDGE
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